

# COMMERCIAL IMPRACTICABILITY UNDER THE INDIAN LAW OF CONTRACT: THE UNIDROIT PRINCIPLES AS THE WAY FORWARD?

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**Abstract:** The present era of heightened liberalisation has encouraged an increasing number of jurisdictions across the globe to offer some respite to the parties to a contract when they experience a subsequent and unforeseen change in circumstance in the form of hardship. However, there is sufficient judicial dicta in India – a common law jurisdiction – to detect a certain hostility to recognising any such situation that is short of impossibility within the definition of section 56 of the Indian Contract Act 1872. The blind application of traditional common law principles has proven to be unsuitable to resolving the predicaments arising in modern-day contracts, which are often affected by inflation and other legal or political changes that have the potential to alter the contracted price of performance to the detriment of one party. The present author suggests that the Indian courts should begin to refer to the International Institute for the Unification of Private Law's (UNIDROIT) approach espoused in its Principles on International Commercial Contracts (the UPICC). Unlike the Indian law of contract, the UPICC adopts a dichotomy between the theories of hardship and *force majeure*, and consequently provides different solutions to address these matters. Employing the UPICC as a gap-filler will assist the Indian courts in interpreting these issues according to well-defined and internationally accepted standards so that the parties can receive fair and adequate relief when the performance of their contract has been affected by hardship.

## A. INTRODUCTION

The principle of the sanctity of contracts has been envisaged in the traditional legal doctrine *pacta sunt servanda*, which means that agreements must be respected. This principle has been uniformly adhered to in civil and common law jurisdictions, and is commonly considered to mandate the strict performance of contracts.<sup>1</sup> Although the principle reinforces certainty and stability in contractual obligations, its rigid application may sometimes run counter to the principles of reasonableness, justice and good faith when extenuating supervening circumstances render the performance of the

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favour relief, whether in the form of amendment to the terms of the agreement,

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<sup>1</sup> See: Vienna Convention on the Law of Treaties, art 26 in relation to international law; *Sapphire v National Iranian Oil Company* Arbitral Award of March 15, 1963, ILR 1967, 136, 181; *Libyan American Oil Company (LIAMCO) v Libya*, Arbitral Award of 12 April 1977 YCA 1981, 89, 101; and Andrew Kull, 'Mistake, Frustration, and the Windfall Principle of Contract Remedies' (1991) 43 Hastings Law Journal 1, 6.

<sup>2</sup> Daniel Girsberger and Paulius Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) 19(1) *Jurisprudence/Jurisprudencija* 121, 123.

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renegotiation, or the suspension or discharge of contractual obligations. Jurisdictions across the globe have, therefore, come to rely on the principle *clausula rebus sic stantibus*<sup>3</sup> to allow exceptions for drastic situations where the foundation of the contract is destroyed.<sup>4</sup> Such deviations have been considered necessary to accommodate to sudden and unforeseen changes, which could not have been contemplated by the parties during the conclusion of the contract. Civil and common law jurisdictions have, respectively permitted such deviation from the strict performance of their contractual obligations to accommodate to changes that have eventually rendered the contract impossible to perform under the doctrines of *force majeure* and frustration of contract.<sup>5</sup> However, some legal systems, and in particular civil law jurisdictions, have additionally recognised the principle of hardship or commercial impracticability as a point of departure from the rigid application of *pacta sunt servanda* to accommodate to supervening circumstances that have merely rendered performance more onerous but not impossible. In contrast, this practice does not seem to have found favour under the traditional principles of the English law of contract, which other common law jurisdictions such as India also follow.

In this respect, the International Institute for the Unification of Private Law (UNIDROIT),<sup>6</sup> which is an independent inter-governmental organisation in Rome, offers a feasible alternative approach to ‘hardship’ via its Principles on International Commercial Contracts (the UPICC). In particular, the UPICC, which were first formulated in 1994 and which were recently revised in 2016,<sup>7</sup> serve as a restatement of international contract law that endeavours to harmonise and modernise the rules

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<sup>3</sup> For a history of the principle, see generally, James Gordley, ‘Impossibility and Changed and Unforeseen Circumstances’ (2004) 52 American Journal of Comparative Law 513. Also see, Vienna Convention on the Law of Treaties 1969, art 62, which stipulates the principle of *rebus sic stantibus* in the context of international law.

<sup>4</sup> Christina Ramberg, ‘The UNIDROIT Principles as a Means of Interpreting Domestic Law’ (2014) 19 Uniform Law Review/ *Rev. dr. unif.* 669, 671.

<sup>5</sup> See generally, Michael G Rapsomanikas, ‘Frustration of Contract in International Trade Law and Comparative Law’ (1979-1980) 18 *Duquesne Law Review* 551.

<sup>6</sup> For a more detailed understanding on the structure of UNIDROIT, see, Jan Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (Mohr Siebeck 1975) 57-59 (translated from the German original); Stefan Vogenauer, ‘Introduction’ in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2<sup>nd</sup> edn, OUP 2015) 7-15; and UNIDROIT, ‘History and Overview’ (*UNIDROIT*, 29 August 2018) <[www.unidroit.org/about-unidroit/overview](http://www.unidroit.org/about-unidroit/overview)> accessed 16 October 2017.

<sup>7</sup> See, UNIDROIT Governing Council, ‘Summary of Conclusions’ 95th Session Rome 18-20 May 2016, C.D. (95) Misc. 2. Also see UNIDROIT Governing Council, ‘Adoption of Additional Rules and Comments to the UNIDROIT Principles of International Commercial Contracts concerning Long-Term Contracts’, 95th Session, Rome [18-20 May 2016].

governing commercial contracts.<sup>8</sup> They may potentially serve as a gap-filler in the national law of contract where the latter does not contain an appropriate solution on a particular question; or as a model law for a country that is looking forward to update its statutes.<sup>9</sup> As Michaels reports, several jurisdictions across the globe have considered and have relied on the provisions of the UPICC while reforming their domestic laws.<sup>10</sup> Spain, Lithuania, the Czech Republic, Slovakia, Ukraine, Hungary, Brazil, Argentina and Russia are some examples of such legal systems that have drawn inspiration from the UPICC.<sup>11</sup> The purpose of this paper is to accordingly analyse the relevance of the UPICC's approach on hardship in modernising the Indian position on commercial impracticability or hardship. The structure of this paper will be as follows: section B will provide a comparative overview of the international best practices on hardship, and focus in particular on the UPICC's provisions on the subject; and section C will examine the Indian approach towards hardship and evaluate the need for the country to employ the UPICC to interpret, supplement or develop the law on this subject. Section D will offer concluding remarks and the author's suggestions for change.

## **B. INTERNATIONAL BEST PRACTICE ON HARDSHIP: AN OVERVIEW**

Although the definition of hardship varies among legal systems, the principle typically refers to any change in circumstances after the conclusion of the contract, which does not render performance impossible but rather severely alters the equilibrium between the parties.<sup>12</sup> These circumstances may be a result of any sudden legal, political or

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<sup>8</sup> See the preamble to the UPICC, which describes itself as 'the Principles [which] set forth general rules for international commercial contracts'. Also see Michael J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 9 *et seq*; and Vogenauer (n 6) 5.

<sup>9</sup> The preamble to the UPICC, para 7, alongside official comment 7 to the concerned provision, para 7. Also see Bonell, *An International Restatement of Contract Law* (n 8) 16, 244-246. For a list of national legislation and International Conventions that have used or can potentially employ the UPICC as a model, see Ralf Michaels, 'Purposes, legal nature and scope of the PICC' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015) 93 *et seq*.

<sup>10</sup> Michaels, 'Purposes, legal nature and scope of the PICC' (n 9) 100 *et seq*.

<sup>11</sup> *Ibid*.

<sup>12</sup> See for instance, *Principles of European Contract Law* (Kluwer International Law, 1999) (PECL 1999) art 6.111; *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference*, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Sellier 2008) (DCFR 2008) art III-1.110; ICC, 'International Chamber of Commerce Hardship Clause 2003' (ICC, 2003) <[www.iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/](http://www.iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/)> assessed 1 November 2017 (ICC Model Clause, 2003); and United Nations Convention on Contracts for the International Sale of Goods (CISG) art 79. Also see Ole Lando & Hugh Beale, 'Principles of European Contract Law – Full Texts of Parts I and II combined' (Kluwer Law International 2000) 322-328; Ingeborg Schwenzer in Peter Schlechtriem and Ingeborg Schwenzer (eds),

economic changes in a country where performance is supposed to take place, and which in turn significantly increases the agreed cost of implementing the contractual obligations or diminishes its value.

### **1. Contractual practice on hardship: A Comparative Overview**

The acceptance of the doctrine of hardship has varied across civil law and common law jurisdictions. Therefore, while civil law systems have generally adopted a dichotomy in proposing solutions for changed circumstances that have resulted in the contract becoming more onerous to perform and those which have resulted in total impossibility, this development has not been followed by common law jurisdictions. In addition, the United States prescribes its own hybrid solution to hardship, which does not resemble the approach adopted by the civil or the common law jurisdictions.

Among the civil law systems, the French legal system has historically recognised the principle of hardship under the theory of *imprévision*.<sup>13</sup> Although French law initially restricted the application of the theory to administrative contracts, its scope has over time been extended to other forms of contractual relationships provided that the parties have expressly agreed to this effect.<sup>14</sup> In addition, several other civil law jurisdictions such as Austria,<sup>15</sup> Germany,<sup>16</sup> Greece,<sup>17</sup> Italy,<sup>18</sup> the Netherlands,<sup>19</sup> Portugal<sup>20</sup> and the Scandinavian countries<sup>21</sup> also embrace the doctrine of hardship in their respective laws to reflect the principle of good faith.<sup>22</sup> In a related vein, the

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*Commentary on the UN Convention on the International Sale of Goods (CISG)* (4<sup>th</sup> edn, OUP 2016) art 79, para 4; Christopher Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (1<sup>st</sup> edn, Kluwer Law International 2009) 167; Girsberger and Zapolskis, (n 2) 122; Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2009) 39(4) *Victoria University of Wellington Law Review* 709, 712-713; and Niklas Lindström, 'Changed Circumstances and Hardship in the International Sale of Goods' (2006) *Nordic Journal of Commercial Law* 23-24. cf Sarah Howard Jenkins, 'Exemption for Non-performance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment' (1998) 72 *Tulane Law Review* 2015, 2025, which puts forward the view that art 79 of CISG does not incorporate the provision of hardship.

<sup>13</sup> See Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (1<sup>st</sup> edn, CUP 2011), 144-145.

<sup>14</sup> See Schwenzer, 'Force Majeure and Hardship' (n 12) 710, 711.

<sup>15</sup> See Austrian Bürgerliches Gesetzbuch (BGB), 1811, secs 936, 1052, and 1170a.

<sup>16</sup> See German BGB, 1900, sec 313.

<sup>17</sup> See Greek Civil Code, 1946, art 388.

<sup>18</sup> See Italian Codice Civile, 1942, art 1467.

<sup>19</sup> See Dutch Civil Code, 1992, art 6:258.

<sup>20</sup> See Portugal Civil Code, 1966, art 437.

<sup>21</sup> See PECL 1999, art 6:111.

<sup>22</sup> Compare with Hans Smit, 'Frustration of Contract: A Comparative Attempt at Consolidation' (1958) 58 *Columbia Law Review* 287, 289-296, which throws light on the Swiss practice in upholding the theory of hardship. Also see Joseph M Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts' (1997) 5 *Tulane Journal of International and Comparative Law*

Principles of European Contract Law, 1999 (PECL)<sup>23</sup> and the Draft Common Frame of Reference, 2008 (DCFR)<sup>24</sup> also contain similar provisions in this respect. The rules on hardship in the civil law systems do not forgive non-performance but instead call upon the parties to renegotiate the terms of their agreement to accommodate to the changed circumstances, where these have fundamentally altered the equilibrium.<sup>25</sup> Further, the courts in most of these jurisdictions are empowered to adapt the contract when such renegotiation has not been viable for some reason;<sup>26</sup> or terminate the contract if the court was unable to find any just and reasonable solution.<sup>27</sup> That said, these systems do not equate hardship with impossibility of performance, which is espoused in the doctrine of *force majeure*.<sup>28</sup> The latter extends to situations attributable to *vis major* (meaning ‘superior force’) or the act of God,<sup>29</sup> and thus exonerates the parties from any liability for non-performance.<sup>30</sup>

On the other hand, the United States ‘flirts with a vaguely defined doctrine’ of hardship,<sup>31</sup> which it calls ‘impracticability’. This jurisdiction seemingly equates

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5; Girsberger and Zapolskis (n 2) 122; and Schwenger, ‘Force Majeure and Hardship’ (n 12) 711-713 for examples of countries and international instruments that accept the modern approach to hardship.

<sup>23</sup> PECL 1999, art 6.111(2).

<sup>24</sup> DCFR 2008, art III-1:110(3)(d).

<sup>25</sup> See PECL 1999, art 6.111(2); DCFR 2008, art III-1:110(3)(d); and ICC Model Clause, 2003 (n 10). Also see, Brunner (n 12) 480-481. But see, German BGB 1900, art 313; Italian Codice Civile 1942, arts 1467-1469; and Dutch Civil Code 1992, art 6.260, which do not obligate the parties to renegotiate the contract on account of hardship. Also see, Schwenger, ‘Force Majeure and Hardship’ (n 12) 722.

<sup>26</sup> PECL 1999, art 6.111(2); DCFR 2008, art III-1:110(3)(d); and ICC Model Clause, 2003 (n 12). Also see, Brunner (n 12) 480-481. cf Dutch Civil Code, art 6.5.3.11 which highlights the reluctance of the Dutch courts in adapting the contract on account of hardship.

<sup>27</sup> *ibid.*

<sup>28</sup> For a detailed discussion on *force majeure* in civil law jurisdictions, see, Marel Katsivela, ‘Contracts: Force Majeure Concept or Force Majeure Clauses?’ (2007) 12(1) Uniform Law Review / *Rev. dr. unif.* 101, 112. Also see generally, Schwenger, ‘Force Majeure and Hardship’ (n 12) for a detailed discussion on the difference between *force majeure* and hardship.

<sup>29</sup> See for instance, Italian Codice Civile, art 1218; Dutch Civil Code, art 6.75; German BGB, arts 275 and 326, which by default restrict the applicability of its provisions on ‘impossibility’ to acts of God. Consequently, the parties are under a mandate to expressly include other events such as war and strike in their contractual terms. Cf French Civil Code, art 1148; Québec Civil Code, art 1470; Greek Civil Code, art 336, PECL 1999, art 8.108; and DCFR 2008, art III-3:104, which by default extend the doctrine of *force majeure* to any impediment-including those that are internal to a contractual party’s sphere of risk, such as war and strike. See Caslav Pejovic, ‘Civil Law and Common Law: Two Different Paths Leading to the Same Goal’ (2001) 32 Victoria University of Wellington Law Review 817.

<sup>30</sup> See Barry Nicholas, ‘Force Majeure and Frustration’ (1979) 27 American Journal of Comparative Law 231, 239; Larry A. Dimattei and Lucien J Dhooze, *International Business Law: A Transnational Approach* (2<sup>nd</sup> edn, Cengage Learning 2004) 134; Perillo, ‘Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts’ (n 22) 5, 6; and Sarah Howard Jenkins, ‘Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment’ (1998) 72 Tulane Law Review 2015, 2020.

<sup>31</sup> Perillo, ‘Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts’ (n 22), 112; and John D Calamari and Joseph Perillo, *The Law of Contracts* (3rd edn Westgroup, 1987) 13-19.

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hardship with impossibility, whereby circumstances that have made the contract more onerous to perform constitute grounds for discharge when the agreement has been rendered useless or radically different from the parties' contemplation at the time of the conclusion of the contract.<sup>32</sup> In this respect, section 2-615 of the Uniform Commercial Code, 1978 (UCC), which is applicable (at least in part) to all of the fifty states and 261 of the Restatement Second (2d) of Contracts, 1981 accordingly employ the principle of impracticability for the sale of goods and other forms of contracts under US law. As the comments to the UCC and the Restatement 2d clarify, the occurrence of circumstances such as 'extreme or unforeseen difficulty, expense...', or 'a severe shortage of raw materials or supplies due to war...' may constitute impracticability *only if* they form the basic assumption on which the contract was concluded and furthermore alter the very nature of performance.<sup>33</sup> In other words, a simple rise or fall in prices would not amount to impracticability unless it was 'well beyond the normal range' or 'wholly abnormal'.<sup>34</sup>

In comparison, the principles of the English common law exclusively determine performance and non-performance by the doctrine of frustration of contract.<sup>35</sup> Consequently, England does not recognise the theory of hardship and mandates the strict adherence to the principle *pacta sunt servanda*. Typically, English courts will refrain from acknowledging pure impracticability or hardship except when it results in the frustration of the contract – for instance when the parties are unable to carry out the contractual obligations for a considerable amount of time *and* subsequently experience an increase in the cost of performance.<sup>36</sup> In this respect, judicial dicta demonstrate that a change in circumstances that has rendered performance more onerous would not lead to the discharge of the contractual obligations,<sup>37</sup> unless the parties demonstrate at least

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<sup>32</sup> *Mineral Park Land v Howard*, 172 Cal 289, 156 P 458 [1956]; and *Transatlantic Fin Corp v United States*, 363 F2d 312, 315 (DC Cir. 1966). For a detailed discussion on the concept of impracticability under the US law of contract, see generally, Michael A Schmitt and Bruce A Wollschlager, 'Section 2-615 Commercial Impracticability: Making the Impracticable Practicable' (1976) 81 Commercial Law Journal 9, 16; Linda Crandall, 'Commercial Impracticability and Intent in UCC Section 2-615: A Reconciliation' (1977) 9 Connecticut Law Review 266, 281; and Thomas Black, Sales Contracts and Impracticability in a Changing World, (1981) 13 St. Mary's Law Journal 247, 290 (1981).

<sup>33</sup> See, UCC, Comment 4 to sec 2-615; Restatement 2d, Comment (d) to sec 261. Also see, Guenter Treitel, *Frustration and Force Majeure* (3<sup>rd</sup> edn, Sweet and Maxwell Publications 2014) 256 *et seq.*

<sup>34</sup> *ibid.* Also see, Treitel (n 33) 278, 289-290, which clarifies that 'tenfold' increase in the cost would constitute commercial impracticability with the meaning and scope of the U.S. law of contract.

<sup>35</sup> See Treitel (n 33) 64, for a detailed discussion on the frustration of contract under the English law.

<sup>36</sup> *Acetylene Co of Great Britain v Canada Carbide Co* [1921] 6 LI L Rep 410 (KB). Also see Treitel (n 33) 284-285.

<sup>37</sup> *British Movietonews Ltd v London and District Cinemas* [1952] AC 166 (HL), 185 *per* Lord Simon; and *Wates Ltd v Greater London Council* [1984] 25 BLR 1; and Treitel (n 33), 299-300.

a subsequent ‘hundredfold increase’ in the prices.<sup>38</sup> This implies that the common law doctrine does not permit a contractual obligation to be excused from performance unless it has either been rendered impossible,<sup>39</sup> or has frustrated the purpose in such a manner that literal performance, although possible, has become fundamentally different from the original contemplation of the parties, and thus the purpose of the contract is defeated.<sup>40</sup> For this reason, the parties would not be discharged from their contractual obligations on such grounds regardless of whether they have incorporated an express stipulation to this effect via a *force majeure* clause in their agreement, which would accordingly, be void.<sup>41</sup>

In summary, civil law jurisdictions adopt a rigid dichotomy in their approach to permitting a deviation from the strict performance of a contract. While parties may be discharged from their obligations in case of impossibility to perform, the occurrence of hardship mandates the renegotiation of the terms to accommodate to the changed circumstances. The US, on the other hand, equates changed circumstances that have resulted in impossibility with those that have merely rendered performance more onerous, insofar as it permits the parties to be discharged in both these situations, although it imposes a high threshold in terms of the extremity of circumstances required for such an outcome. In comparison, the courts in the UK are mandated, under the doctrine of frustration of contract, only to acknowledge supervening changed circumstances that have destroyed the very bargain that the parties have made, and thus refrain from providing respite when the performance has merely become more onerous.

## **2. The UNIDROIT’s Solution to Hardship**

With the UPICC, the UNIDROIT offers a practical and sustainable solution on commercial impracticability or hardship to assist lawmakers and courts to interpret,

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<sup>38</sup> *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 Lloyd's Rep 147 (CA), 501 *per* Lord Denning. Also see, Treitel (n 33) 282, which opines that the phrase ‘hundredfold increase’ refers to a fantastic and unlikely contingency.

<sup>39</sup> See *Taylor v Caldwell*, 122 Eng Rep 309 (QB) 1863, which is the landmark verdict on the English doctrine of impossibility. Also see, Treitel (n 33) 69, 74.

<sup>40</sup> See *Krell v Henry* [1903] 2 KB 740, which is the seminal case on ‘frustration of purpose’ under the English law of contract. See also Treitel (n 33) 65-66.

<sup>41</sup> See *Thames Valley Power Ltd v Total Gas and Power Ltd* [2005] EWHC 2208; and *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC*, [2010] EWHC 40. cf the earlier verdict of *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 Lloyd's Rep 147 (CA) 501 (Lord Denning) which stated that an escalation in the cost of performance by a ‘hundredfold’ would discharge the seller from the performance under the doctrine of ‘frustration of the contract’ by bringing the *force majeure* clause into operation.

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supplement or develop legislation according to internationally accepted standards.<sup>42</sup> The UPICC's significance lies in the fact that although they are in the form of soft law,<sup>43</sup> they are apolitical and are not drafted by government officials, but rather by experts in the field in their private capacity.<sup>44</sup> In relation to the subject of hardship, the UPICC offer neutral clarifications insofar as they draw inspiration from jurisdictions across the globe to reflect the values of both the civil and the common law systems.<sup>45</sup> They therefore adopt rules that are recognised in most legal systems and are consequently not tilted in favour of any country's specific interests.<sup>46</sup>

The UPICC embrace a rigid dichotomy between the principles of *force majeure* and hardship. The UPICC's provision on *force majeure* is included in its chapter on non-performance. A disadvantaged party may be excused from performance due to the occurrence of a supervening event if it is able to prove the existence of *force majeure* via article 7.1.7 of the UPICC. Although *force majeure* pertains to impossibility to perform, it is not limited to events that are attributable to acts of God or *vis major*. Instead, the scope of article 7.1.7 extends to the occurrence of *any* impediment that was beyond the party's control,<sup>47</sup> and which it 'could not reasonably be expected to have taken into account at the time of the conclusion of the contract, or to have avoided or overcome it or its consequences'.<sup>48</sup> The parties to a contract may, in such circumstances, terminate the contract and withhold performance due to such

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<sup>42</sup> See UPICC, para 6 of Preamble, read along with Official Comment 6 to the concerned para; and Ralf Michaels, 'The UNIDROIT Principles as Global Background Law' (2004) 19 Uniform Law Review / *Rev. dr. unif.* 643, 655-656. Also see generally, Dimattei and Dhooge, (n 30) 236; Eckart Brödermann, 'The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal' (2006) Uniform Law Review / *Rev. dr. unif.* 749; and Michael J Bonell, 'An International Restatement of Contract Law' (28 October 2011) Georgetown University Law Centre for Transnational Business and the Law: Symposium on the 2010 UNIDROIT Principles of International Commercial Contracts: Towards a "Global" Contract Law, 22-24 <[www.law.georgetown.edu/cle/materials/unidroit/2011.pdf](http://www.law.georgetown.edu/cle/materials/unidroit/2011.pdf)> accessed 2 November 2017.

<sup>43</sup> Non-binding legal principles are commonly referred to as 'soft law'. Bonell defines 'soft law' as 'general instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance'. See, Micheal J Bonell, 'Soft Law and Party Autonomy: The case of the UNIDROIT Principles' (2005) 51 Loyola Law Review 229, 229. Also see, Sieg Eiselen, 'Globalization and Harmonisation of International Trade Law' in Faure and Van der Walt (eds) *Globalization and Private Law: The Way Forward* (1st edn, Edward Elgar 2008) 97, 123-125.

<sup>44</sup> See Alan Farnsworth, 'The American Provenance of the UNIDROIT Principles' (1998) 72 Tulane Law Review 397, 397; and Bonell, *An International Restatement of Contract Law* (n 8) 16, 33.

<sup>45</sup> For a more detailed understanding on the UPICC, see Vogenauer, (n 6) 7-30; Bonell 'An International Restatement of Contract Law' (n 8) 305 *et seq*; and Michael J Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles' (2007) Uniform Law Review / *Rev. dr. unif.*, 233.

<sup>46</sup> See Farnsworth (n 44) 397; and Bonell, *An International Restatement of Contract Law* (n 8) 16, 33.

<sup>47</sup> UPICC, Official Comment 1 to art 7.1.7.

<sup>48</sup> *ibid*; art 7.1.7(1) read along with illustration 1(1) to the concerned provision.



impediments,<sup>49</sup> provided that the supervening event was unforeseeable and beyond the parties' sphere of allocated risk.<sup>50</sup> Appropriately, if such impediment is temporary, non-performance on account of *force majeure* would merely be excused as long as the effect of such event lasts.<sup>51</sup>

As regards hardship, the UPICC incorporate the common law's preference for the strict adherence to the principle *pacta sunt servanda* as a basis but further accommodate to unique and extenuating circumstances that may potentially render performance more onerous but not impossible. In this context, article 6.2.1 stipulates that each party is bound to perform its obligations irrespective of whether 'the performance has become more onerous for one of the parties'.<sup>52</sup> However, article 6.2.2 subsequently qualifies this principle of sanctity of contracts by clarifying that the parties would not be obligated to adhere to the terms of the agreement if they experience hardship. Such hardship should manifest itself through the occurrence of an event which 'fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has diminished'. The occurrence of any of these events must occur or become known to the disadvantaged party after the conclusion of the contract. Furthermore, such a change in circumstances should be beyond the control of the disadvantaged party,<sup>53</sup> and of such a nature that the party could not have reasonably taken the same into account at

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<sup>49</sup> UPICC, art 7.1.7(4).

<sup>50</sup> Pascal Pichonnaz, 'Non-performance in General' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2<sup>nd</sup> edn, OUP 2015) 871 *et seq.*

<sup>51</sup> UPICC, art 7.1.7(2). cf Hans Van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' (1995) *International Trade and Business Law* 13, 18, which opines that the circumstances to determine temporary impossibility may not always be clear.

<sup>52</sup> Also see UPICC, Official Comment 1 to art 6.2.1; Ewan McKendrick, 'Hardship' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2<sup>nd</sup> edn, Oxford University Press 2015) 812-813; and Houtte, (n 51) 13. Also see, the ICC International Court of Arbitration (Zürich), Arbitral Award No 8486 (1996); the ICC International Court of Arbitration, Arbitral Award No. 9479 (1999) (parties unknown); *Delta Comercializadora de Energia Ltda v AES Infoenergy Ltd*, the Court of Câmara FGV de Conciliação e Arbitragem (São Paulo, Brazil), Arbitral Award No. 1 of 2008 (2009); *Insurance Company Provita v Joint-Stock Commercial Bank Forum*, Kyiv Regional Commercial Court, Ukraine (2009); *G Brencius v "Ukio investicine grupe"*, Supreme Court of Lithuania (2003); the *Tribunal de Contas da União*, Brazil (2011), which also underscore the general duty to perform unless there is a fundamental alteration in the original contractual equilibrium as provided in UPICC, art 6.2.1.

<sup>53</sup> UPICC, art 6.2.2(b) read along with Official Comment 3(b) to art 6.2.2(b); and McKendrick (n 52) 43, 817.

the time of formation of the contract.<sup>54</sup> In a related vein, the disadvantaged party must prove that it did not assume the risk of such an event.<sup>55</sup>

Although the parameters for determining the circumstances that constitute a ‘fundamental alteration’ are nebulous,<sup>56</sup> the Official Comments illustrate that this could either be due to a dramatic rise in the price of the raw materials that are required for the production of the contracted goods; because of an increase in the cost of the services that need to be rendered; or as a consequence of an introduction of new safety regulations.<sup>57</sup> Such effects are thus most likely to be experienced by the party that is obliged to perform the non-monetary obligations.<sup>58</sup> In a related vein, dramatic inflation or a frustration of purpose that is attributable to sudden changes in the market conditions would also constitute hardship under the UPICC insofar as these diminish the value of performance that one party was entitled to receive under the contract.<sup>59</sup>

Upon the determination of hardship, the UPICC further entitles the disadvantaged party to the right to request the renegotiation of the terms of the contract via article 6.2.3. However, intervention by a court is permissible if such renegotiations are unsuccessful.<sup>60</sup> In such situations, the court may adapt the contract ‘to restore its equilibrium’ and to achieve a ‘fair distribution of the losses between the parties’.<sup>61</sup> Such adaptation may either mandate a modification of the agreed prices; changes in the quantity to be delivered; a change in the means, method or duration of performance; or require a compensatory adjustment.<sup>62</sup> Alternatively, the court may order the termination of the contract if such adaptation is unfeasible.<sup>63</sup>

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<sup>54</sup> *ibid* art 6.2.2(c) read along with Official Comment 3(c) 216; and McKendrick (n 52) 43, 818.

<sup>55</sup> *ibid* art 6.2.2(d) read along with Official Comment 3(d) 216; and McKendrick (n 52) 43, 818. cf Hans Stoll and Georg Gruber, ‘Article 79’ in Peter Schlechtriem & Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods* (2<sup>nd</sup> edn, OUP 2005) art 79 para 22; Bonell, *An International Restatement of Contract Law* (n 8) 220, 393, referring to *United States v Wegematic Corp*, 360 F.2d 674, 676 (2d Cir. 1966) (Henry Friendly J); Denis Tallon, ‘Article 79’ in Cesare Bianca and Michael Bonell (eds), *Commentary on the International Sales Law: the 1980 Vienna Convention* (Giuffrè 1987) art 79 para 2.6.3.

<sup>56</sup> But see Brunner (n 12) 428 *et seq*; Girsberger and Zapolskis (n 2) 126 *et seq*; Schwenzer ‘Force Majeure and Hardship’ (n 10) 716, which provide suggestions as regards the circumstances that would ‘fundamentally alter the equilibrium of the contract’.

<sup>57</sup> UPICC, Official Comment 2 (a) to art. 6.2.2.

<sup>58</sup> *ibid*.

<sup>59</sup> *ibid*, Official Comment 2(b). Also see, *Cherkassy Branch of OJSC Kredobank v Individual entrepreneur 2*, Cherkasy Regional Commercial Court, Ukraine (2009); and *Wirtgen Ukraine v TOV VAB Leasing*, the Kyiv Commercial Court of Appeal, Ukraine (2010),

<sup>60</sup> See UPICC, art 6.2.3(4)(a)-(b).

<sup>61</sup> UPICC, Official Comment 7 to art. 6.2.3(4); and McKendrick, (n 52) 43 821.

<sup>62</sup> Brunner (n 12) 3 referring to Lando/Beale, PECL 1999, Comment D on art 6.111, 327.

<sup>63</sup> See UPICC, Illustration 5 to Official Comment to art 6.2.3(4).

This being the case, under normal circumstances the UPICC does not advocate the discharge of the parties from performance merely on the grounds of hardship.<sup>64</sup> In this respect, it reaffirms civil law's practice insofar as it endeavours to keep the contract alive as far as practicable.<sup>65</sup> The UPICC thus also adopts a more liberal and contemporary approach in comparison with the English law of contract, which considers frustration of purpose as a ground for discharge and further does not acknowledge any changes which merely render performance more onerous.<sup>66</sup>

### **C. THE THEORY OF HARDSHIP UNDER THE INDIAN LAW OF CONTRACT**

In India, every domestic dispute arising from the performance and non-performance of a contractual obligation - regardless of whether it involves a government, private enterprise or an individual - is governed by the Indian Contract Act 1872. In addition, that legislation also regulates disputes arising from transnational contracts, when the proper law is that of India.

The Indian Contract Act 1872 does not contain any specific provision on hardship. Instead, support for hardship is confined to judicial dicta, which indicate that the paradigms of the subject shall be assessed within the parameters of the principles of discharge by the frustration of contract. In particular, paragraph two of section 56 of the legislation which is predicated on the English law regulates the subject of frustration and provides:

a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

A contract is thus said to be frustrated under section 56 of the Indian Contract Act 1872, when discharge has occurred either due to impossibility or when performance becomes radically different from the original contemplation of the parties.<sup>67</sup> Impossibility or *force majeure* under the Indian law of contract is subject to the express stipulations of the parties' agreement, but is not merely limited to acts of God or *vis major*. Instead, *force majeure* extends to all other unforeseeable supervening events

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<sup>64</sup> But see, UPICC, art 6.2.3(4), which permits termination as a last resort.

<sup>65</sup> See Official Comment 6 to art 6.2.2 of the UPICC.

<sup>66</sup> See *Krell v Henry* [1903] 2 KB 740; and Treitel (n 33) 65-66.

<sup>67</sup> *Satyabrata Ghose v Mugneeram Bangur & Co* [1954] SCR 310. Also see, Nilima Bhadbhade (ed), *Pollock and Mulla on the Indian Contract and Specific Relief Acts* (1<sup>st</sup> edn, Lexis Nexis Publications 2014) 871-872. Also see Treitel (n 33) 64-66.

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that the parties cannot prevent by any amount of human care and diligence.<sup>68</sup> In this respect, the Supreme Court has, in the seminal case of *Satyabrata Ghose v Mugneeram Bangur & Co*,<sup>69</sup> further clarified that the application of paragraph two of section 56 of the Indian Contract Act 1872 is not restricted to physical or literal impossibility.<sup>70</sup> While commenting on the Government's temporary requisitioning of land for military purposes, Mukherjea J opined that the courts could additionally employ section 56 to regulate instances of commercial impracticability, but only when performance has become:

useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change in circumstances totally upsets the very foundation upon which the parties rested their bargain.<sup>71</sup>

The Indian law of contract is therefore akin to the English common law insofar as it disregards the occurrence of frustration of the contract on account of pure commercial impracticability or hardship unless the changed circumstances have affected the very bargain that the parties made, and rendered the performance impossible in the time and manner contemplated.<sup>72</sup> For this reason, section 56 of the Indian Contract Act 1872 does not permit the parties to be relieved merely on account of an alteration in economic circumstances, which only renders the performance more onerous, for instance, due to a price rise or fall. Consequently, the Supreme Court in *Alopi Parshad & Sons Ltd v Union of India*<sup>73</sup> disregarded the appellant's plea to invoke the doctrine of frustration of contract when, due to the changed circumstances caused by the Second World War, the agreement became more burdensome to perform due to an abnormal increase in the prices of *ghee*, which was initially supposed to be supplied at a fixed rate.<sup>74</sup> Shah J reaffirmed that the change in circumstances in question did not

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<sup>68</sup> See the verdict of the Supreme Court in *Dhanrajamal Gobindram v. Shamji Kalidas & Co*, AIR 1961 SC 1285, [17]-[19], referring to the decision of the English courts in *Lebeaupin v. Richard Crispin & Co* [1920] 2 KB 714. Also see, Bhadbhade, (n 67) 871, 915; and Avtar Singh, *Law of Contract: A Study of the Contract Act, 1872 and Specific Relief* (12<sup>th</sup> edn, Eastern Book Company 2017) 402-403.

<sup>69</sup> [1954] SCR 310.

<sup>70</sup> AIR 1954 SC 44.

<sup>71</sup> *ibid* [9].

<sup>72</sup> *ibid*. Also see *Sachindra Nath v Gopal Chandra*, AIR 1949 Cal 240; *Pameshwari Das Mehra v Ram Chand Om Prakash*, AIR 1952 Punj 34. Also see *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* (1916) 2 AC 397; *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 (HL); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL); *British Movietonews Ltd. v. London and District Cinemas* [1950] 2 All E.R. 390 (CA)166; *Davis Contractors v Fareham Urban District Council* [1956] AC 696; *Krell v Henry* [1903] 2 KB 740; and Treitel (n 33) 65-66 on the frustration of purpose.

<sup>73</sup> AIR 1960 SC 588

<sup>74</sup> *ibid*.

‘in itself affect the bargain’ that the parties had made.<sup>75</sup> He further observed that the doctrine of frustration as enshrined in section 56 of the Indian Contract Act 1872 would only come into play when the performance has eventually become impossible or unlawful and *not merely altered*.<sup>76</sup> The court further accentuated that it was not endowed with any ‘general liberty’ to ‘absolve a party from liability to perform his part of the contract merely because, on account of a contemplated turn of events, the performance of the contract may become onerous’.<sup>77</sup>

Shah J’s opinion has continued to represent the judicial view in India by the mandate enshrined in article 141 of the Constitution of India 1950, which mandates that ‘the law declared by the Supreme Court shall be binding on all courts within the territory of India’. The Supreme Court has continued to express similar hostility in a line of other cases, such as *Continental Construction Co Ltd v State of MP*,<sup>78</sup> *Travancore Devaswom Board v Thanath International*;<sup>79</sup> and more recently in *Bharti Cellular Limited v Union of India*.<sup>80</sup> Consequently, while rejecting a party’s appeal for adaptation of the agreement due to hardship, Banumathi J of the Madras High Court stressed that it was a settled principle that the Indian Contract Act 1872 does not enable the parties to ignore express stipulations and renegotiate the contract on some ‘vague plea of equity’.<sup>81</sup> Hence, although the change in circumstance was ‘completely outside the contemplation of parties’ at the time of the conclusion of the contract, it would not enable the court to sanction departure from the express terms of the contract.<sup>82</sup>

### 1. *Commercial hardship and force majeure clauses*

In subsequent cases, the parties expressly incorporated the occurrence of certain supervening circumstances, which could plausibly render the performance more onerous, in the *force majeure* clause of their agreement. In such instances, one may assume that India, being influenced by the English common law of contract, would disregard the mere inclusion of such clauses as a shield from performance unless the

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<sup>75</sup> *ibid*, [4]. Also see *British Movietonews Ltd v London and District Cinemas* [1950] 2 All E.R. 390 (CA), 185.

<sup>76</sup> *ibid*.

<sup>77</sup> *ibid*.

<sup>78</sup> AIR 1988 SC 1166.

<sup>79</sup> (2004) 13 SCC 44.

<sup>80</sup> (2010) 10 SCC 174.

<sup>81</sup> *Sree Kamatchi Amman Constructions v The Divisional Railway Manager-Works, Palghat Division*, OSA Nos 109 & 247 of 2005, [38].

<sup>82</sup> *ibid*. Also see, Indian Contract Act 1872, sec 62 which prohibits the parties to make any variance to the existing terms of their agreement, except by the conclusion of a new contract.

supervening event has frustrated the very purpose of the contract.<sup>83</sup> Although the parties could regulate *force majeure* situations in the contract, they could not expand the availability of relief to apply to less extreme supervening events. However, the judicial dicta in India have failed to provide any clear illustration of the exact legal position in this respect.

For instance, in a dispute before the Delhi High Court in *Coastal Andhra Power Limited v Andhra Pradesh Central Power Distribution Co. Ltd & Others*,<sup>84</sup> the parties expressly stipulated that they would be discharged if the performance of their obligations was ‘prevented, hindered or delayed’ due to a *force majeure* event that triggered *inter alia* changes in the cost of materials required.<sup>85</sup> In this case the contract pertained to the long-term supply of coal from Indonesia at a fixed price of USD 24 Per Metric Ton (PMT).<sup>86</sup> As a result of the promulgation of a new Indonesian Regulation in 2010, the prices of coal escalated by 150 percent, viz. from the contracted rate of USD 24 PMT to USD 60 PMT.<sup>87</sup> The supplier, namely Coastal Andhra Power Ltd (CAPL), subsequently issued a notice in 2011 to the respondent claiming to be released under the *force majeure* clause. CAPL asserted that the performance of the project had ‘become unviable’ due to the ‘exponential increase in coal prices’ as a consequence of a sudden and unforeseeable change in the law.<sup>88</sup>

Rejecting these contentions, Muralidhar J opined that Indian law would not permit the parties to be discharged, irrespective of the construction of the *force majeure* clause in question, since the change in circumstance did not ultimately prevent them from performing their obligations. Instead, the parties should ‘generally factor in the possibility of [a] sudden fluctuation in international prices’ by incorporating ‘risk purchase and like clauses’ in their commercial contract.<sup>89</sup> Accordingly, the disadvantaged party could merely claim compensation for the loss suffered in such circumstances.<sup>90</sup> Muralidhar J nonetheless remained silent as regards the parameters for claiming such compensation – whether it would confer a right on the aggrieved party

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<sup>83</sup> Also see the verdict of the English court in *British Movietonews Ltd v London and District Cinemas* [1950] 2 All E.R. 390 (CA), which expressed a similar opinion.

<sup>84</sup> Decision of the Delhi High Court, OMP No. 267 of 2012 (decided on 2 July 2012).

<sup>85</sup> *ibid* [24].

<sup>86</sup> *ibid* [5].

<sup>87</sup> *ibid* [7].

<sup>88</sup> *ibid* [7]-[8].

<sup>89</sup> *ibid* [24]. Also see the verdict of the English court in *Thames Valley Power Ltd v Total Gas and Power Ltd* [2005] EWHC 2208, which expressed a similar opinion.

<sup>90</sup> *ibid*.

to request a renegotiation of the contractual price, or instead exclusively empower the court to adapt the contract.<sup>91</sup> In any event, it appears that all such claims to compensate would be outside the scope of the present provisions of the Indian Contract Act 1872, enshrined in section 62, which prohibits any variation to the existing terms of the agreement unless it is through the conclusion of a new contract.<sup>92</sup>

It appears, however, that the courts in India have not been adopting a uniform approach while interpreting the relationship between frustration of the contract and commercial impracticability. For instance, in a more recent judgement, the Appellate Tribunal for Electricity, New Delhi (the Tribunal), on the contrary invoked section 56 of the Indian Contract Act 1872 to discharge the aggrieved party from its obligations due to a sudden increase in the price of performance.<sup>93</sup> This was the position in *Uttar Haryana Bijli Vitran Nigam Ltd v Central Electricity Regulatory Commission*, whereby the Tribunal had the opportunity to hear fifteen appeals that were separated into four groups, but which primarily concerned the impact of an Indonesian Regulation of a similar nature to that discussed in *Coastal Andhra Power Limited*.<sup>94</sup> Moreover, the parties also stipulated via their *force majeure* clause that they would be discharged if the performance of their contract was ‘hindered’ and subsequently rendered commercially impracticable ‘as a consequence of’ any other supervening event that was beyond their reasonable control.<sup>95</sup>

While examining whether the suppliers could rightfully invoke the *force majeure* clause due to the escalation in prices together with a shortage/non-availability in the supply of coal from Indonesia, the Tribunal relied on the findings of the apex court in *Alopi Parshad*<sup>96</sup> and *Dhanrajamal Gobindram*<sup>97</sup> and emphasised that it was a ‘well-settled principle in law’ that a mere increase in prices does not lead to an impossibility of performance under the contract.<sup>98</sup> However, it underscored that due regard must be given to the wordings of the terms of the clause in the present case. Appropriately, since the agreement had subsequently become more onerous to perform

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<sup>91</sup> cf UPICC, art 6.2.3 read along with Brunner (n 12) 3 referring to Lando/Beale, PECL 1999, Comment D on art 6.111,327.

<sup>92</sup> Also see *Sree Kamatchi Amman Constructions v The Divisional Railway Manager-Works, Palghat Division*, OSA Nos 109 & 247 of 2005, per Banumathi J, [38]

<sup>93</sup> The decision of the Appellate Tribunal for Electricity, decided on 7 April 2016.

<sup>94</sup> *ibid* [24].

<sup>95</sup> *ibid* [280] referring to art 12 of the Power Purchase Agreement (PPA).

<sup>96</sup> AIR 1960 SC 588.

<sup>97</sup> AIR 1961 SC 1285.

<sup>98</sup> The decision of the Appellate Tribunal for Electricity, decided on 7 April 2016 [192].

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due to a *force majeure* event, namely the sudden change in the law, it had rendered performance in the manner that was originally contemplated by the parties impossible and, thus, constituted ‘frustration’ within the ambit of section 56 of the Indian Contract Act 1872. Consequently, the parties were discharged since ‘the basic premise’ of the contract had been wiped out,<sup>99</sup> and they ‘found themselves...in a fundamentally different situation’ from what they initially agreed.<sup>100</sup>

**2. Assessing the Plausible Uses of the UPICC as a Gap-Filler**

The Indian Contract Act, 1872 provides no respite to the parties when performance has merely become more onerous unless it has additionally been rendered impossible within the parameters of section 56. The Indian law, therefore, mandates the parties to a contract to delineate specific conditions as the basis of their agreement and subsequently prove its destruction, before petitioning the court for discharge from the performance.<sup>101</sup> The courts in India have, consequently, been compelled to choose between two extreme results – namely, either to compel the parties to perform the contract, and thus completely ignore the change in circumstances that have rendered the performance more onerous, or conversely, permit the parties to be discharged from their respective obligations. These shortcomings are problematic because it has permitted the Indian judiciary to override the contractual provisions irrespective of the parties’ intention to be discharged on account of sudden and unforeseen circumstances, such as the escalation of prices, under a *force majeure* clause. Consequently, parties may be prompted to refrain from selecting the Indian law to govern their transnational commercial contracts. The Indian legal system could, consequently, avoid these anomalies by relying on the UPICC, which has offered a viable solution to tackle

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<sup>99</sup> See *Satyabrata Ghose v Mugneeram Bangur & Co* [1954] SCR 310; and *Alopi Parshad*, AIR 1960 SC 588, wherein the apex court stressed that the supervening circumstances must destroy the bargain that the parties have made. Also see the provisions of the US law of contract on impracticability as enshrined in secs 2-615 and 261 of the UCC and Restatement 2d, respectively, read along with official comment 4 and d to the concerned provisions, which similarly stipulates that discharge due to commercial impracticability will only be permitted if the change in circumstances formed the ‘basic assumption’ on which the contract was concluded.

<sup>100</sup> The decision of the Appellate Tribunal for Electricity, decided on 7 April 2016 [289]. Also see *British Movietonews Ltd v London and District Cinemas* [1952] AC 166, 185.

<sup>101</sup> Also see in this regard sec 2-615 of the UCC; para 313 of the German BGB; and the English common law of contract enshrined in *FA Trampsin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397; *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd* [1945] AC 221 (HL); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL), *British Movietonews Ltd. v. London and District Cinemas* [1950] 2 All E.R. 390 (CA), *Davis Contractors v Fareham Urban District Council* [1956] AC 696, *Krell v Henry* [1903] 2 KB 740, and *Treitel* (n 33) 65-66, which similarly determines the impact of hardship on performance, subjectively.



sudden and unforeseen changes that have merely rendered the performance of the contract onerous.

Unlike section 56 of the Indian Contract Act 1872, the UPICC via article 6.2.2 adopts an unambiguous approach by stipulating that a *prima facie* case of hardship would be made out as soon as the parties experience a *fundamental* disequilibrium that is manifested through an increase or decrease in the value of performance.<sup>102</sup> The UPICC's provisions on hardship are consequently applicable regardless of whether the parties have delineated the basic premise of their contract to be something else.

Moreover, the UPICC is predicated on well-defined standards to assess the existence of the conditions that may lead to discharge and could therefore plausibly play a crucial role in the development of the Indian law of contract. The application of the UPICC's provisions to cases of commercial impracticability would prove more desirable for the parties because it would neither compel the disadvantaged party to fulfil the obligations even when the equilibrium of the contract has been fundamentally altered, nor would it immediately discharge such a party from performance. The UPICC would, instead, keep the contract alive, albeit on modified terms, by entitling the disadvantaged party to request for the re-negotiation to accommodate to the changed circumstances. As demonstrated in the discussion above, the UPICC does not entitle the disadvantaged party to be discharged due to the occurrence of sudden supervening events except through a 'comparatively comprehensive method',<sup>103</sup> this is to say when the re-negotiation or adaptation of the contract has been proven unfeasible under article 6.2.3(4); or on the determination of *force majeure* under article 7.1.7 of the UPICC.

Consequently, employing the UPICC's approach with respect to the dichotomy between the provisions on hardship and *force majeure* would have assisted the Indian court in cases such as *Alopi Parsad*,<sup>104</sup> *Coastal Andhra Power Ltd*<sup>105</sup> and *Uttar Haryana Bijli Nigam* where the parties had undoubtedly experienced hardship and re-negotiation of the contractual terms was, consequently, feasible. Although the Tribunal adopted a relatively empathetic approach in *Uttar Haryana Bijli Vitran Nigam Ltd*<sup>106</sup> by at least recognising extenuating circumstances of the nature described above, it needlessly discharged the disadvantaged party when performance was still possible. In such

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<sup>102</sup> See Girsberger and Zapolskis (n 2) 124-125.

<sup>103</sup> Ramberg (n 4) 671.

<sup>104</sup> AIR 1960 SC 588.

<sup>105</sup> Decision of the Delhi High Court, OMP No. 267 of 2012 (decided on 2 July 2012).

<sup>106</sup> Decision of the Appellate Tribunal for Electricity, decided on 7 April 2016.

circumstances, the Tribunal could have instead adapted the terms of the contract and altered the equilibrium between the parties by taking into account the changed circumstances caused by the dramatic inflation in the prices of coal. These inconsistencies have only arisen due to the narrow precepts within which the Indian courts have been compelled to interpret section 56 read along with section 62 of the Indian Contract Act 1872. As seen above, the judiciary has been combining the determination of hardship with *force majeure* by refusing to acknowledge the former except when it is complemented with the latter.

That being said, the parties to a transnational contract may plausibly choose the UPICC as the governing law to avoid these incongruities in the Indian approach towards hardship.<sup>107</sup> In other cases, the Indian judiciary may begin on their own motion employ the UPICC's provisions on the subject as a gap-filler to interpret or supplement<sup>108</sup> the application of section 56 of the Indian Contract Act 1872, to cases of commercial impracticability,<sup>109</sup> as they have relied upon other provisions of UPICC in a few instances in the past.<sup>110</sup> Employing the UPICC's *favor contractus* approach, which adopts the preference for the fulfilment of an agreement, would provide fair and adequate redress in such situations by assisting the Indian judiciary in interpreting precisely how radically changed circumstances can render the contract extremely onerous, but not as such impossible. The parties would consequently be obligated to renegotiate the terms in all cases of hardship, the determination of which as such has been objectively assessed. The utilisation of the UPICC's provisions would further permit the Indian courts to adapt the contract where necessary and feasible – a power

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<sup>107</sup> See, UPICC, para 2 to the Preamble, which stipulates that the UPICC 'shall be applied when the parties have agreed that their contract be governed by them'. Also see, (Indian) Arbitration and Conciliation Act 1996, sec 28(1)(b)(iii), which permits the parties to choose non-state norms such as the UPICC as the governing law for their transnational arbitration agreement; and Saloni Khanderia, 'Indian Private International Law *vis-à-vis* Party Autonomy in the Choice of Law' (2018) Oxford University Commonwealth Law Journal 1, 13-14, DOI: 0.1080/14729342.2018.1436262, which reports that the acceptance of the UPICC as the governing law in matters of litigation remains to be seen.

<sup>108</sup> See UPICC, para 6 of the Preamble.

<sup>109</sup> See *SE Oil v M/s Gorakharam Gokalchand* (1962) 64 Bom LR 113, which clarified that the Indian Contract Act, 1872 is the default legislation that would govern all disputes arising out of domestic agreements.

<sup>110</sup> See the decisions of the Delhi High Court in *Sandvik Asia Pvt Ltd v Vardhman Promoters Pvt Ltd*, 2006 (2) CTLJ 305 Del; and *Hansalaya Properties and Another v. Dalmia Cement (Bharat) Ltd*, RFA (OS) No.26/1986, Judgment pronounced on 20 Aug 2008, where the court relied on the UPICC, arts 4.1, 4.4 and 4.5 to settle the parties' claims. It should be noted that there is no provision in Indian law permitting such judicial reference to the UPICC, and the courts did not identify the specific legal basis for their references in these cases.

which Indian legislation does not presently provide the courts with – within the meaning and scope of section 62 of the Indian Contract Act 1872.<sup>111</sup>

#### D. CONCLUSION

Predicated on the English common law, India has demonstrated itself to be the ‘staunchest bastion’ of *pacta sunt servanda*.<sup>112</sup> Such a traditional approach has not been suitable in resolving the predicaments that may arise in modern-day transnational contracts, which are often affected by inflation and other circumstances that have the potential to alter the contracted price of performance to one party’s detriment. This blind adoption of the principles of the English law on ‘frustration of contract’ have contributed to the ambiguities prevalent in the Indian legal system, which fails to provide any reliable standard as regards cost increases *vis-à-vis* performance of the contract. It has, therefore, been hard to formulate an exact opinion on the Indian position on hardship because its courts have failed to maintain a uniform stance in this respect.

The above discussion demonstrates that the general hostility among the country’s judiciary towards acknowledging any change in circumstances following the conclusion of the contract unless these have *altogether* destroyed the basic premise on which the parties’ agreement was founded.<sup>113</sup> On the contrary, the Tribunal in *Uttar Haryana Bijli Vitran Nigam Ltd*<sup>114</sup> decided to invoke the *force majeure* clause in the parties’ contract when the obligations became more onerous to perform due to a subsequent increase in the prices. It is, accordingly, submitted that Indian courts should strongly consider using the UPICC’s provisions on hardship as a gap-filler for interpreting and developing its law of contract according to internationally acceptable standards.<sup>115</sup> In this respect, the most commendable feature of the UPICC’s solution to hardship or commercial impracticability remains its ability to balance and weigh the common law’s preference for the rigid adherence to *pacta sunt servanda*,<sup>116</sup> with the flexibility offered by the civil law.<sup>117</sup> At the same time, reference to the UPICC would

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<sup>111</sup> See *Sree Kamatchi Amman Constructions v The Divisional Railway Manager-Works, Palghat Division*, OSA Nos 109 & 247 of 2005 *per* Bahumati J.

<sup>112</sup> Perillo, ‘Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts’ (n 22) 113; and Joseph M Perillo, *Contracts* (7<sup>th</sup> edn, West Academic Publishing 2014), 487.

<sup>113</sup> See, the verdicts of the Supreme Court in *Alopi Parshad*, AIR 1960 SC 588; *Continental Construction Co Ltd v State of MP*, AIR 1988 SC 1166; *Travancore Devaswom Board v Thanath International* (2004) 13 SCC 44; and *Bharti Cellular Limited v Union of India* (2010) 10 SCC 174.

<sup>114</sup> Decision of the Appellate Tribunal for Electricity, decided on 7 April 2016.

<sup>115</sup> See, UPICC, para 6 of the Preamble.

<sup>116</sup> See, UPICC, art 6.2.1.

<sup>117</sup> *ibid* arts 6.2.2 and 6.2.3.

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enhance the certainty and predictability in the law in India by enumerating the precise circumstances that constitute hardship or conversely *force majeure*, in an objective fashion.